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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 526

THELMA D. PARR and GEORGE B. PARR,
Petitioners,

versus

FRANK SCOFIELD, Individually and as United States Collector of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

THELMA D. PARR AND GEORGE B. PARR
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AMERICAN PRINTERS

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is an action under the Tucker Act to recover income taxes and interest alleged to have been illegally assessed and collected for the year 1944.

During the year 1936, George B. Parr acquired as community property a 420-acre oil and gas lease in Webb County, Texas, hereinafter sometimes called the Benavides Lease, and in the same year transferred the lease to Hamill & Smith, a partnership, (Stip. of Facts, R. 15, 16), retaining equitable title to one-fourth of said lease. (Plaintiffs' Exhibit 2, R. 34, 51, 61). At the time of the transfer to Hamill & Smih, there was an oral agreement that Hamill & Smith would take care of the financing and would develop and operate such lease for the mutual benefit of George B. Parr and Hamill & Smith. (Plaintiffs' Exhibit 2, R. 34, 51, 53, 88, 89). After production was obtained under the lease, Hamill & Smith disputed the existence of the agreement, and Parr brought suit against them in the state court. Parr assigned 45% of his interest in the property and accumulated income to his lawyers. The suit was ultimately decided in Parr's favor, and he was adjudged to possess a one-fourth interest in the lease and equipment, and to be entitled to be reimbursed for his one-fourth of the profits earned in the prior years, as well as to receive a similar portion of the profits earned in the future, (R. 89), with proper adjustment for the disbursements made by Hamill & Smith for Parr's one-fourth of the equipment, and the sum of $10,000.00 previously paid to Parr. (Plaintiffs' Exhibit 2, R. 34, 51, 62).

The judgment became final in January of 1944, and Hamill & Smith accounted for Parr's one-fourth of the net income from the beginning of operations in 1936 to December 31, 1943. (Stip. of Facts, R. 15, 17).

As a result of the suit, Parr received the following sums of money from Hamill & Smith during the year 1944:

55% of 25% of net income from the lease	$165,554.30
55% of 25% of interest allowed on the judgment	22,868.58
Total	$188,422.88

(R. 89).

In 1945, Parr and his wife filed separate returns for the year 1944, in which they reported one-fourth of the net income from the 1944 operations of the lease. They did not report any income from the lease attributable to operations prior to 1944; but they filed amended returns for the years 1940 to 1943, inclusive, in which they reported their distributive share of net income from the lease. During the year 1945, they filed delinquent partnership income tax returns in the name of Hamill & Smith & Parr for the years 1936 to 1943, inclusive. (R. 89, 90).

Upon examination of petitioners' 1944 income tax returns, the Commissioner found that the amount collected on the state court judgment, plus the fair market value of petitioners' interest in the lease and equipment, constituted income from litigation for the year 1944 not subject to any depletion allowance. As a result of this finding, the Commissioner assessed additional taxes and interest against George B. Parr and Thelma D. Parr in the respective amounts of $93,219.40 and $93,370.06. Petitioners paid the additional assessments, and then filed claims for refund, which were rejected. Then they filed this suit in the district court to recover the amounts alleged to be illegally assessed against them. The district court denied recovery, holding that the taxpayers were required to report in 1944, as income, the sums recovered by them in 1944 in the state court. In so holding, the court rejected the taxpayers' contention that, because Parr was a member of a partnership, the income should have

been taxed in the years when earned, as well as their contention that they were entitled to a deduction for depletion under Section 23(m) of the Internal Revenue Code. (R. 90).

The petitioners appealed to the Fifth U. S. Circuit Court of Appeals, and that court affirmed the judgment of the district court. (R. 88-93).

II.

BASIS UPON WHICH THIS COURT HAS JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 7, 1950. This Court has jurisdiction under Section 1254(1), Title 28, United States Code, Judiciary and Judicial Procedure, and Supreme Court Rule No. 38, Section 5.

III.

QUESTIONS PRESENTED

1. Was George B. Parr a joint adventurer with the partnership of Hamill & Smith for the years 1936 to 1943, inclusive?

2. If George B. Parr was a joint adventurer with Hamill & Smith for the years 1936 to 1943, inclusive, did the fact that such relationship had to be established by litigation remove the case from the operation of Section 182(c), Internal Revenue Code, which requires a joint adventurer (partner) to report his distributive share of partnership income, whether or not distribution is made to him?

3. If, under the law and facts of this case, George B. Parr was required to report in his 1944 return his

share of net income earned for the years 1936 to 1943, inclusive, was he entitled to a deduction for depletion on his share of gross income from an oil producing lease under Sections 23(m) and 114(b)(3) of the Internal Revenue Code?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. In holding that the relationship between Hamill & Smith and Parr did not constitute a joint venture, the courts below arrived at a conclusion of law in direct conflict with the decisions of the Tenth Circuit Court of Appeals in *Reynolds* v. *McMurray*, 60 F.(2d) 843, cert. denied, 287 U. S. 664; the Ninth Circuit Court of Appeals in *Helvering* v. *Armstrong*, 69 F.(2d) 370; and the Civil Court of Appeals for the Fourth Supreme Judicial District of Texas in *Hamill & Smith* v. *Parr*, 173 S. W. (2d) 725.

2. The decision of said Circuit Court of Appeals that Parr would not be entitled to a recovery, even if he had been able to establish a partnership or joint venture, is in direct conflict with the decision of the Third Circuit Court of Appeals in *First Mechanics Bank of Trenton* v. *Commissioner*, 91 F. (2d) 275.

3. The decisions of the courts below that petitioners are not entitled to a deduction for percentage depletion are in direct conflict with the decision of this Court in *Kirby Petroleum Co.* v. *Commissioner*, 326 U. S. 599.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and

complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 13,160, THELMA D. PARR and GEORGE B. PARR, Appellants, v. FRANK SCOFIELD, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

THELMA D. PARR AND GEORGE B. PARR

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THELMA D. PARR and GEORGE B. PARR,
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versus

FRANK SCOFIELD, Individually and as United States Collector of Internal Revenue,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OR CERTIORARI

I.

OPINIONS OF THE COURTS BELOW

The opinion in the distict court (R. 65) is reported in 89 F. Supp. 98. The opinion in the Circuit Court of Appeals (R. 88-92) is reported in ..... F. (2d) .....

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under Section 1254(1) Title 28, United States Code, Judiciary

and Judicial Procedure, and under Supreme Court Rule No. 38, Sec. 5.

III.

STATUTES INVOLVED

The applicable statutes will be found in the Appendix, *infra.*

IV.

STATEMENT OF THE CASE

This has already been stated in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

V.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding:

1. That George B. Parr was not a joint adventurer with the partnership of Hamill & Smith for the years 1936 to 1943, inclusive.

2. That even if George B. Parr was a joint adventurer with Hamill & Smith for the years 1936 to 1943, inclusive, he was not taxable on his share of net income until he received it in 1944.

3. That George B. Parr was not entitled to a deduction for depletion on his share of gross income from the Benavides Lease under Sections 23(m) and 114(b)(3), Internal Revenue Code.

VI.

ARGUMENT

SUMMARY OF THE ARGUMENT

POINT 1. Petitioners established by the stipulation of facts (Plaintiffs' Exhibit 1, R. 15-21) and the judgment of a state court (Plaintiffs' Exhibit 2, R. 34, 51-65) the existence of a joint venture between the partnership of Hamill & Smith and George B. Parr for the years 1936 to 1943, inclusive. *Reynolds* v. *McMurray*, 60 F. (2d) 843, cert. denied, 287 U. S. 664.

POINT 2. Having established that George B. Parr was a joint adventurer with Hamill & Smith for the years 1936 to 1943, inclusive, petitioners were taxable on their distributive share of net income from the joint venture in the years in which earned. Sec. 182 (a), Internal Revenue Code; *First Mechanics Bank of Trenton* vs. *Commissioner*, 91 F. (2d) 275.

POINT 3. Having established under state law their ownership of a one-fourth interest in the Benavides Lease from the date of acquisition, (Plaintiffs' Exhibit 2, R. 34, 51, 61), petitioners had an economic interest in the oil and gas in place that was depleted by production, and they are entitled to percentage depletion under Sections 23 (m) and 114 (b) (3) of the Internal Revenue Code. *Kirby Petroleum Co.* v. *Commissioner*, 326 U. S. 599.

POINT 1.

The respondent offered no evidence in the trial court to show that George B. Parr was not a joint adventurer with Hamill & Smith during the years in question. On the other hand, petitioners introduced in evidence, as part of the stipulations of fact, their sworn statements setting out facts sufficient to establish the joint venture. (R. 15,

22-31). In addition, they introduced in evidence the verdict of the jury and the judgment of the state district court entered in the suit alleged in their claims for refund. The jury found as a fact that Hamill & Smith agreed to take care of the financing and to develop and operate said lease for the mutual benefit of George B. Parr and Hamill & Smith. (Plaintiffs' Exhibit 2, R. 34, 51, 53). The judgment of said state court recited that Hamill & Smith had made disbursements for themselves and George B. Parr in the drilling, development and operation of said lease, and that the income from said lease had been received by Hamill & Smith for themselves and George B. Parr. (Plaintiffs' Exhibit 2, R. 34, 51, 62).

On appeal by Hamill & Smith from the judgment of the state district court to the Fourth Civil Court of Appeals, said Civil Court of Appeals held that Parr was a joint adventurer with Hamill & Smith. *Hamill & Smith* v. *Parr*, 173 S. W. 2d 725.

In *McMurray* v. *Reynolds*, 38 F. (2d) 480, McMurray owned an interest in a prospective oil field, having acquired the same through one Armstrong. Sometime prior to the year for which additional income taxes were assessed against McMurray, an agreement for the promotion and development of the oil field was entered into with an oil company, under which agreement the company was to advance all the funds necessary for the promotion and development of the property, and that such expense would be borne solely by the company, unless oil or gas was produced. Upon the happening of such contingency, however, the expense of such promotion and development would be borne upon the basis of 60 per cent to the company and 40 per cent to Armstrong, and that said 40 per cent of such expense should be charged upon the books of the company against Armstrong until it, together with

the 60 per cent borne by the developing company, should liquidate the entire cost of the development. The development of the property proceeded, resulting in the discovery of oil, and the arrangement between the parties was carried into effect by the company, charging Armstrong with his 40 per cent of the development and crediting his account with his 40 per cent of the proceeds from production. The condition so prevailed in 1920, concerning which the first controversy over income taxes arose, that a considerable portion of the product from the oil field had been marketed, but not a sufficient amount to cover the expense of the development.

McMurray, owner of a portion of the original Armstrong interest, did not report any income from the property for the year 1920. The Bureau assessed additional taxes for the year 1920 against McMurray on the theory that he had to report his share of income from the joint venture. McMurray paid the taxes under protest, then brought suit in the district court to recover. The district court entered judgment for the taxpayer and an appeal followed. The Tenth Circuit Court of Appeals reversed, holding that the parties were joint adventurers and the income from the oil property was the income of both joint adventurers. *Reynolds* v. *McMurray*, 60. F. (2d) 843. The Supreme Court denied certiorari, 287 U. S. 664.

The principal arguments of the respondent on this point in the courts below were that Hamill & Smith had not agreed to be joint adventurers with Parr, and that Parr did not participate in the management or in the operation of the property. The argument that Hamill & Smith did not agree to the joint venture is refuted by the verdict and judgment in the state court. The argument that a joint venture can not exist unless all joint adventurers participate in the management or in the operation of the

business is without merit and is refuted by the decision of the Tenth Circuit Court of Appeals in *Reynolds* v. *Mcmurray*, 60 F. (2d) 843, and by the decision of the Ninth Circuit Court of Appeals in *Helvering* v. *Armstrong*, 69 F. (2d) 370.

The Circuit Court of Appeals in the instant case, citing *Farrell* v. *Commissioner*, 134 F. (2d) 193, held that the essential issue concerning the existence of an asserted joint venture was a question of fact for decision by the trial court, and that it was not convinced that the decision of the trial court was clearly erroneous. Petitioners concede that the issue of a joint venture was a question of fact for decision by the trial court, but petitioners submit that, since there is not a scintilla of evidence in the record rebutting petitioners' proof that there was a joint venture, the decision of the trial court on this issue was clearly erroneous as a matter of law. *Foran* v. *Commissioner*, 165 F. (2d) 705; *Grace Bros.* v. *Commissioner*, 173 F. (2d) 170.

The facts as to the issue of a joint venture, as determined by the judgment of the state court, are on all fours with those in *Reynolds* v. *McMurray*, 60 F. (2d) 843, and the decisions of the courts below are in direct conflict therewith. This Court should resolve the conflict.

POINT 2.

The Circuit Court of Appeals, again citing *Farrell* v. *Commissioner*, 134 F. (2d) 193, held that even if Parr was a joint adventurer with Hamill & Smith for the years 1936 to 1943, inclusive, he was not taxable on his share of partnership income until he received it in 1944. It is respectfully submitted that the *Farrell* case is no authority for this proposition. In the *Farrell* case, the court specifically held that there was no partnership or joint venture.

Petitioners concede that they are not taxable until 1944 on their share of income from the Benavides Lease unless George B. Parr was a joint adventurer with Hamill & Smith. If this Court holds that there was a joint venture with Hamill & Smith, then petitioners are taxable on their distributive share of partnership income in the years in which the income was earned. (Sec. 182(a), Internal Revenue Code). The decision of the Circuit Court of Appeals to the contrary is in direct conflict with the decision of the Third Circuit Court of Appeals in *First Mechanics Bank of Trenton, N. J., et al* v. *Commissioner*, 91 F. (2d) 275, in which case one J. Philip Bird and the Canadian Car & Foundry Company, Ltd., hereinafter called the Canadian Company, were joint adventurers in manufacturing munitions for the Imperial Russian Government. One contract was completed in the year 1916 and certain profits were realized by the joint adventurers. There was no claim by the Canadian Company that Bird was not entitled to any portion of the profits, but it did deny that he was entitled to the amount claimed by Bird. Litigation followed and sometime after October 22, 1922, Bird obtained judgment in the sum of $312,723.46. The Canadian Company appealed to the Kings Bench of Canada. Before the appeal was heard, however, the Canadian Company and Bird reached an agreement in 1928 whereby Bird accepted $200,000 as a compromise settlement.

In his income tax report for 1928, Bird reported the net amount of his profits from the joint venture as capital gain and paid $20,646.22 thereon. The Commissioner of Internal Revenue assessed a deficiency of $20,179.53 against Bird on the ground that his net profit constituted ordinary net income for the year 1928 and that Bird was an employee and not a joint adventurer. Bird appealed to the Board of Tax Appeals contending that the income,

if any, was received, within the meaning of the Revenue Acts, in 1916 and not in 1928. Bird died before the appeal was heard and his executors were substituted as the petitioners.

The Board sustained the Commissioner and the petitioners appealed to the U. S. Circuit Court of Appeals for the Third Circuit. That Honorable Court held that the relationship between Bird and the Canadian Company was a joint venture and that Bird was taxable on his distributive share of the net profits for the year 1916. The Court said:

> "In the present case the contracts were completed in 1916. The profits were realized by the joint venture at that time and there was nothing conditional or contingent about their receipt. They were earned and paid. Bird, therefore, was legally entitled to his share of the profits which was $312,723.46, and was taxable on that share although he did not actually receive it in that year. That he saw fit to compromise the amount due him for $200,000 in 1928 did not diminish his liability for taxes for 1916. * * *
>
> "In the case at bar, the fact that a controversy arose between the joint venturers did not change the fact that profits, taxable income, had been received in 1916 by the partnership."

It is respectfully submitted that the decisions of the courts below are in conflict with the decision of the Third Circuit Court of Appeals and this Court should exercise jurisdiction to resolve the conflict.

The attention of this Court is called to the fact that the Commissioner may reopen any of petitioners' prior

years in which they have failed to report their distributive share of partnership income from the Benavides Lease. (Section 3801 (b) (3), I. R. C.). Therefore, the Federal government will not lose any revenue to which it is entitled in the event that it is held that a partner is taxable on his distributive share of partnership income for the year in which earned, even though the partnership agreement has to be established by litigation. Section 3801 was inserted in the Revenue Act of 1938 to cover situations of this kind.

POINT 3.

The decision of the state court holding that Parr owned a one-fourth interest in the Benavides Lease from date of acquisition in 1936, is an adjudication of property rights under state law and is binding on the Commissioner and the Federal government. *U. S.* v. *Ogilvie Hardware Co., Inc.*, 330 U. S. 709; *Helvering* v. *Stuart*, 317 U. S. 154; *Magruder* v. *Supplee*, 316 U. S. 394; *Lyeth* v. *Hoey*, 305 U. S. 188; *Blair* v. *Commissioner*, 300 U. S. 5; *Freuler* v. *Helvering*, 291 U. S. 35. When Parr took title to the lease in his own name, he held legal title thereto but Hamill & Smith owned equitable title to three-fourths of the lease. When Parr transferred legal title to the lease to Hamill & Smith, he retained equitable title to one-fourth thereof. Thereafter, Parr had an economic interest in the oil in place that was depleted by production. In *Kirby Petroleum Co.* v. *Commissioner*, 326 U. S. 599, this Court held that if a taxpayer had an economic interest in oil and gas in place that was depleted by production, he was entitled to depletion on income from the property, even though he did not hold title to the property. It is respectfully submitted that petitioners are entitled to depletion on their share of gross income from the property under the doctrine of *Kirby Petroleum Co.* v. *Commissioner*, *su-*

pra, and that the courts below committed reversible error in holding to the contrary.

The argument of respondent that petitioners realized income from litigation rather than from the Benavides Lease is pure sophistry. Parr recovered one-fourth of the gross income from the lease, less one-fourth of the disbursements made by Hamill and Smith for the benefit of themselves and Parr.

The Circuit Court of Appeals said:

> "The appellants are entitled to no depletion deduction, because they had no known, established, or legally recognized interest until the litigation in the state court was determined."

It may, perhaps, suffice to call this Court's attention to the fact that the foregoing statement ignores the decision of the state court wherein it was held that Parr owned a one-fourth interest in the lease from the date of acquisition, but petitioners would further show that the one case cited to support the reasoning of the Circuit Court of Appeals, *Massey* v. *Commissioner*, 143 F. (2d) 429, 431, does not do so. In the *Massey* case, one Massey, an attorney, contracted to represent a client for an interest in an oil and gas lease. The Fifth Circuit Court of Appeals correctly held that Massey was not entitled to depletion on oil produced prior to the time he acquired his interest in the lease. Massey was in the same position with respect to depletion as Parr's attorneys would be if they claimed depletion on the oil produced prior to August 1, 1941, the date they received an assignment to 45% of Parr's interest in the lease and accumulated income. In this case, Parr acquired legal title to the lease in 1936, he then transferred legal title to Hamill & Smith but retained equitable title to one-fourth of said lease. The fact that he had to bring suit to es-

tablish his legal title did not change the fact that he had equitable title, a depletable interest, to one-fourth of the oil in place from the date of acquisition in 1936. According to the reasoning of the Circuit Court of Appeals, if Hamill & Smith had given Parr a valid written assignment of the one-fourth interest in the lease in 1936, but Parr had misplaced the written assignment before recording it, and Hamill & Smith had then denied having made the assignment until several years later when Parr found the misplaced instrument and brought suit and recovered his share of income from the lease, Parr would not be entitled to depletion because he would have had "no known, established, or legally recognized interest until the litigation was determined."

The Circuit Court of Appeals further held that petitioners were not entitled to depletion because Hamill & Smith were required to report the entire income from the property as their taxable income, and were entitled to depletion thereon. It is significant that no authorities were cited to support this theory. If any other court has ever held that one taxpayer is required to report another taxpayers' income in his own return, the petitioners have been unable to locate such decision. Neither do the petitioners know of any other decision where a taxpayer has been denied depletion on his income from oil because some other taxpayer had either mistakenly or intentionally reported the same income.

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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APPENDIX

INTERNAL REVENUE CODE:

Sec. 182. TAX OF PARTNERS. In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, * * *

Sec. 3797 (a) (2). PARTNERSHIP AND PARTNER. The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

Sec. 23. DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions: * * *

(m) DEPLETION. In the case of * * * oil and gas wells, * * * a reasonable allowance for depletion * * *.

Sec. 114 (b) (3). PERCENTAGE DEPLETION FOR OIL AND GAS WELLS. In the case of oil and gas wells the allowance for depletion under Section 23 (m) shall be 27½ per centum of the gross income from the property during the taxable year * * *. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property * * *.

Sec. 3801. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

(a) DEFINITIONS. For the purpose of this section—

(3) RELATED TAXPAYER. The term "related taxpayer" means a taxpayer who, with the taxpayer with respect to whom a determination specified in subsection (b) (1), (2), (3), or (4) is made, stood in the taxable year with respect to which the erroneous * * * exclusion * * * therein referred to was made, in one of the following relationships: * * * (F) partner.

(b) CIRCUMSTANCES OF ADJUSTMENT. When a determination under the income tax laws—

(3) Requires the exclusion from grass income of an item with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year or from the gross income of a related taxpayer, * * * and, on the date the determination becomes final, correction of the effect of the error is prevented by the operation (whether before, or after May 28, 1938) of any provision of the internal revenue laws other than this section and other than section 3761 (relating to compromises), then the effect of the error shall be corrected by an adjustment made under this section * * *.

(c) METHOD OF ADJUSTMENT. The adjustment authorized in subsection (b) shall be made by assessing and collecting * * * the amount thereof * * * in the same manner as if it were a deficiency * * *.